

STATE OF ARKANSAS
ASSESSMENT COORDINATION DEPARTMENT

DEWAYNE MACK

PETITIONER

VS

Case #04-003

ASSESSMENT COORDINATION
DEPARTMENT

RESPONDENT

DECISION

On March 1, 2006, this cause came on for hearing before the Assessment Coordination Department (ACD) Training and Certification Board (Board) pursuant to Arkansas Code Annotated (ACA) 25-15-208, the Arkansas Administrative Procedures Act.

Appearing in person was Petitioner Mr. Dewayne Mack and his Attorney, Mr. Eric G. Hughes of Wright, Berry, Hughes & Moore of Arkadelphia, Arkansas. Appearing for the Assessment Coordination Department was their General Counsel, Mr. Bob Leslie.

UNCONTROVERTED FACTS OF THE CASE:

Mr. Dewayne Mack, one of the owners of Mack-Reynolds Appraisal Company, Inc. of Glenwood, Arkansas, was the Appraisal Manager for the three year countywide reappraisal ending in 2004 of all real property in Clark County, Arkansas. The ACD is required by law to test (by a ratio study) the accuracy of all completed countywide reappraisals and publish the result on August one of the last year of each reappraisal cycle. In 2004 when the ACD tested the completed reappraisal results in Clark County they found evidence of sales chasing. The ACD sent auditors to Clark County and conducted a follow up investigation that confirmed that sales chasing had occurred and that reappraisal results were, therefore, unreliable and unusable. On August 19, 2004 an out of compliance determination letter was sent to Mr. Mack, as Appraisal Manager, and

others as required by ACD rule and applicable law. After studying the evidence, Mr. Mack agreed that sales chasing had occurred and requested that Mack-Reynolds be allowed to correct the work at their own expense as required by Act 1185 of 1999. The ACD agreed and provided a plan for corrective action which was accepted by the county and Mack-Reynolds and the corrective work was begun.

On November 10, 2004, the ACD sent the following letter to Mr. Mack:

"The Assessment Coordination Department 2004 Ratio Study for Clark County revealed that the selective appraisal of sold properties in which the values for these sold properties were set near the sale price, while values for unsold properties were set at lesser amounts, commonly called "sales chasing", had occurred in the reappraisal process ongoing in the county.

On August 19, 2004, as appraisal manager for the Clark County reappraisal, you were notified that the reappraisal for the county was out of compliance with standards established by the Assessment Coordination Department *Rules and Regulations*. Specifically, there were inaccuracies and inconsistencies in grade, effective age and condition, and obsolescence had been misused. Since market analysis was based on inaccurate data, valuation was also flawed.

The Department has determined that:

The manipulation was done by Mr. Roger Burchfield, an employee of your company;

1. Mr. Burchfield did not have the training and experience necessary to do the work he was assigned;
2. As the contractor and appraisal manager, you were responsible to ensure that Mr. Burchfield had the proper training and experience;
3. As the contractor and appraisal manager you were responsible to see that Mr. Burchfield knew what "sales chasing" was and that he understood the seriousness of the offense. Specifically you were responsible to see that "sales chasing" did not occur;
4. You did not adequately supervise Mr. Burchfield;
5. You did not adequately review his work;
6. You delegated work that you should have done personally as appraisal manager.

ACD Rule 3.30 provides:

Reappraisal performance must conform to these Rules and Regulations, and the appraisal process must uniformly employ logical and generally accepted methods and techniques that are necessary to produce credible appraisals.

ACD Rule 3.31 provides:

The Director of the Department may, for cause, and after opportunity for a hearing, suspend or terminate the contract of any appraisal firm or county, suspend or terminate the appraisal manager status of an appraisal manager, or remove an appraisal firm from the list of eligible contractors.

In addition, the Department's Policies and Procedures for the Training and Certification Program for Appraisers Employed by State and County Officials provides that the Director may suspend the certification of any appraiser for any period of time deemed necessary for unprofessional conduct or lack of appraisal ability.

The Department finds that, as to the Clark County reappraisal, you did not ensure that logical and generally accepted methods and techniques that are necessary to produce credible appraisals were uniformly employed.

It is the decision of the Department that your appraisal manager's certification shall be suspended for a minimum of one year beginning January 1, 2005. Upon successful completion of the following requirements you may request reinstatement of your certification: you must attend the 2004 and 2005 Appraisal Manager's Seminars; you must take the IAAO 300, Fundamentals of Mass Appraisal course and pass the test; you must take the fifteen hour IAAO Workshop 151, Uniform Standards of Professional Appraisal Practice and pass the test.

The Department has taken into consideration that it found no evidence of intentional wrong doing on your part and did find that you have fully cooperated with the Department and are in the process of doing the remedial work, required by law, to correct the problems in the Clark County reappraisal at your own expense. In addition you have taken punitive action with regard to Mr. Burchfield's employment.

In accordance with the Arkansas Administrative Procedures Act you may request a hearing before the agency Director. Please notify this office within twenty days from the date of this letter if you want to schedule a hearing. The hearing will be recorded. You may be represented by an Attorney and you may present testimony and other evidence of your choice. If you do not request a hearing within the allotted time, this decision will become final."

A hearing before the Director of the ACD was timely requested by the Petitioner and the suspension of Mr. Mack's Appraisal Managers status and the other requirements contained in the letter were put on hold pending the hearing. Subsequently Petitioner requested that the hearing be held before the Training and Certification Board rather than the Director. The Director granted the request with the proviso that the Board would make a recommendation to her and she would make the final decision.

Petitioner asserted that the Director was biased and prejudiced against him and should not make the final decision. The Petitioner supported his motion with an affidavit that he had reason to believe the Director was biased or prejudiced toward him but offered no other proof. The director denied that she was biased or prejudiced against the petitioner but eventually elected to recuse in favor of the Board making the final decision on the grounds that she did not want the final decision to be under suspicion by anyone.

THE ISSUES:

Petitioner rested his case on the proposition that the November 10, 2004, decision of the ACD Director should be overruled because:

- A. It was arbitrary and capricious;
- B. It was not supported by substantial evidence; and,
- C. It violated his Due Process rights as guaranteed by the Fourteenth Amendment to the United States Constitution.

THE DECISION:

After two days of testimony the Board unanimously found in favor of the ACD and against the petitioner on all three issues. The decision of the Director was not arbitrary and capricious; was supported by substantial evidence; and did not violate the petitioners Due Process rights. The Board was troubled by a Force Majeure clause in the contract but felt that it was vague and based upon the evidence presented the clause did not relieve the petitioner of his responsibility to review Mr. Burchfield's work.

PROPOSED CONCLUSIONS OF LAW:

The issues as set out above were also submitted by the petitioner as requested conclusions of law.

Board response: Denied.

PROPOSED FINDINGS OF FACT:

The following are the Proposed Findings of Fact submitted by the Petitioner and the responses thereto of the Board.

1. Roger Burchfield engaged in sales chasing during the 2004 Clark County reappraisal.

Board response: Granted.

2. Dewayne Mack was the appraisal manager for the 2004 Clark County reappraisal.

Board response: Granted.

3. The actions of Roger Burchfield were done in secret after the field work data entry was completed.

Board response: Denied. On the evidence presented, the Board cannot say that all of the grade and age changes that Mr. Burchfield made occurred after field work and data entry were completed but based on his own testimony the Board believes that most of it was so done. However, the creditable testimony of Mr. Burchfield was that he left a paper trail for all to see and kept copies of the “before the change” print out and “after the change” print out stapled together and placed in a stack for anyone looking at his work to see. In fact, one such before and after print out was provided to the ACD by the Petitioner upon request and was entered into evidence by the ACD.

4. The actions of Roger Burchfield were done after the Phase One and Phase Two Audits by the ACD.

Board response: Denied. The Phase Two Audit was not completed until the final Sales Ratio Study was done upon completion of the corrective work. From the testimony presented it is clear that the ratio study is a part of the Phase Two Audit. Therefore the sales chasing did not occur after the Phase Two Audit.

5. All work up to and through the Phase One and Phase Two Audits were in compliance with the Rules and Regulations of the Assessment Coordination Department.

Board Response: Denied. The audit letters sent by the ACD after each audit provided "The findings refer to the specific components of the reappraisal that were audited, and do not verify compliance in all areas of the reappraisal." Said letters, along with testimony, are in evidence.

6. The CAMA software employed in Clark County in 2004 did not allow Dewayne Mack to obtain data extracts with which to analyze for sales chasing.

Board response: Denied. It was not necessary for Mr. Mack to obtain data extracts from the CAMA software system used in Clark County in order to find sales chasing. If Mr. Mack had looked at the field cards the sales chasing would have been obvious. This was confirmed by several witnesses. One Mack-Reynolds employee, first testified that Mr. Mack would have had to have

- the extracts to catch the sales chasing but her own testimony in another case was read to her where she said sales chasing could be found by looking at the field cards. In addition, there was other testimony in the record that if Mr. Mack had done any ratio studies or impact analysis it would have alerted him to the sales chasing. Mr. Mack stated that he did not run such tests although he acknowledged that the software system would allow such tests to be run and in fact Mr. Burchfield did so. There was other testimony that Mr. Mack could have used Excel software to find sales chasing as Mr. Page Kutait had done.
7. Roger Burchfield's certification as a level 4 appraiser qualified him to perform the tasks and functions assigned to him during the 2004 Clark County reappraisal.
Board Response: Denied. By not reviewing Mr. Burchfield's work, Mr. Mack was allowing Mr. Burchfield to essentially "be" the Appraisal Manager, a function for which he was not qualified.
 8. Roger Burchfield knew what sales chasing was and that it was prohibited.
Board Response: Denied: We cannot say that Mr. Burchfield knew what it was. He indicated that he knew only in a general sort of way. He stated that he knew that it was not right to change the grade and ages without a legitimate appraisal reason but he stated that he didn't know the harm that was being done.
 9. Dewayne Mack and Mack-Reynolds Appraisal Company corrected the data manipulated by Roger Burchfield at no cost to the Clark County.
Board response: Denied as to Dewayne Mack. Granted as to Mack-Reynolds Appraisal Company: As pointed out above, they were required to do so by Act 1185 of 1999.
 10. Dewayne Mack and Mack-Reynolds performed all corrective actions required by ACD.
Board response: Denied as to Dewayne Mack. Granted as to Mack-Reynolds. The corrective action was directed toward Mack-Reynolds Appraisal Company, not Dewayne Mack.
 11. The 2004 Clark County reappraisal passed the Final Ratio Study.
Board response: Granted.
 12. No tax payer was adversely affected by the actions of Roger Burchfield.

Board response: Granted. However they would have been affected if the ACD hadn't discovered it.

13. Dewayne Mack did not engage in sales chasing.

Board response: Granted. The ACD letter of August 19, 2004 stated that there was no evidence that Mr. Mack was guilty of sales chasing.

14. The Director did not consider the required factors stated in Rule and Regulation 3.31.

Board response: Granted. The Director did not consider said factors but both the Director and Mr. Boyce testified that the Director was not required to consider those factors in that said factors clearly referred to the paragraph immediately above the paragraph containing the factors. Both witnesses testified that when the amendment to the rule was presented to the appropriate legislative committee for review before becoming final, a document was prepared giving the reasons the amendment was needed. In the document the factors were discussed only in relation to the paragraph directly above it which had nothing to do with the Director's authority to suspend the Appraisal Managers' status. The document was introduced into evidence.

15. The Directors Order constituted disparate treatment of similarly situated individuals.

Board response: Denied. The individuals were not similarly situated.

(a.) In the Garland County case the Director did not have the benefit of having in existence Rule 3.31 authorizing her to suspend an Appraisal Managers designation for cause. In Mr. Mack's case, the rule clearly was in existence.

(b.) Garland County was an "in-house" county. Meaning the County did the reappraisal work with its own staff. The Appraisal Manager was a salaried employee of the county and could be, and he was, fired from his job at the request of the Director. Mr. Mack was a co-owner of an appraisal company and would have some control as to whether or not he could be fired.

(c.) There was a difference in scale. In the Garland County case, the Appraisal Manager was handling only that one county. In the Clark County case, Mr. Mack was handling several counties, not just one.

CONCLUSION:

The suspension for one year of Mr. Mack's Appraisal Managers designation and the other requirements of him as contained in the November 10, 2004, letter from the ACD will be effective as of the date of this order.

IT IS SO ORDERED this 14th day of March 2006.

MIKE PEARCE
CHAIRMAN

WILLIAM (JOE BILL) MEADOR
BOARD MEMBER

JANET TREVATHAN
BOARD MEMBER

NOTE:

The Petitioner has appealed this decision to the Circuit Court of Clark County and it is currently pending there.